Supreme Court, U. S.
FILED
NOV 7 1978
MICHAEL RODAK, JR., CLERK

No. 78-70

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILKES COUNTY, GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

WILKES COUNTY SCHOOL DISTRICT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Pursuant to this Court's Rule 16, the United States moves to affirm the judgments of the district court.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-17a) is reported at 450 F. Supp. 1171.

JURISDICTION

The opinion and judgments of the three-judge district court were filed on April 20, 1978. Notices of appeal to this Court were filed on May 31, 1978 (J.S. App. 21a-

24a), and the jurisdictional statement was filed on July 11, 1978. The jurisdiction of this Court is invoked under 42 U.S.C. (Supp. V) 1973c.

QUESTION PRESENTED

Whether appellants sufficiently showed that a state statute and local constitutional amendment changing the procedure for electing a county Board of Commissioners and Board of Education have neither a racially discriminatory purpose nor a racially discriminatory effect.

STATEMENT

1. Wilkes County, Georgia, is governed by a Board of Commissioners consisting of a chairman and four other members (J.S. App. 1a-2a).[1] Until 1958 the chairman of the Board was elected at-large and the remaining members were appointed by the county grand jury.[2] See 1917 Ga. Laws, at 436; Complaint, Civ. No. 76-1045 (D.D.C.), para. 7. At a referendum election in 1958, the voters of Wilkes County approved a local law that made all five positions on the Board elective.[3] The new law divided the county into four election districts and provided that the voters of each district should elect a resident of that district as a member of the Board. The 1958 law also

[1]Until 1968 county boards of commissioners in Georgia were known as county boards of commissioners of roads and revenues. See Ga. Code Ann. § 23-803 (1971 Rev.).

[2]General statutory provisions governing the composition and method of selection of county grand juries in Georgia are codified in Ga. Code Ann. ch. 59-2 (1965 and 1978 Supp.). The powers and duties of the county grand jury are set forth in Ga. Code Ann. ch. 59-3 (1965).

[3]The law had been adopted earlier in the year by the Georgia General Assembly. See 1958 Ga. Laws, at 2091-2095.

provided that the voters of the entire county should continue to elect the Board's chairman. In 1972 the Georgia legislature passed a local law providing that all five members of the Board should be elected at-large. The 1972 act retained the district residency requirement for the four Board members other than the chairman. See 1972 Ga. Laws, at 3337-3338.[4]

2. The Wilkes County School District is governed by a Board of Education consisting of a chairman and four other members (J.S. App. 2a-3a). Before 1958, all members of the Board of Education were appointed by the county grand jury, in accordance with the Georgia Constitution and the governing state statute. See Ga. Code Ann. § 2-5302 (1977 Rev.) (formerly § 2-6801 of the 1945 Georgia Constitution); and Ga. Code Ann. § 32-902 (1976 Rev.). In 1958 the Georgia legislature proposed, and the Wilkes County voters adopted, a local constitutional amendment that provided for the election of the members of the Board of Education. See 1958 Ga. Laws, at 460; Complaint, Civ. No. 76-1046 (D.D.C.), para. 7. The amendment divided the county into four election districts and stated that the voters of each district should elect a resident of that district as a member of the Board of Education. (The districts were the same as those established in 1958 for the election of members of the Board of Commissioners.) The 1958 amendment also provided that the voters of the entire county should elect the chairman of the Board of Education. In 1972 the

[4]In 1975 the Georgia legislature passed another local law that recreated the Wilkes County Board of Commissioners and consolidated earlier acts and amendments regarding the Board's powers and the method of selecting the Board's members. The 1975 law incorporated verbatim the portion of the 1972 act that provided for the at-large election of commissioners previously elected from individual districts. See 1975 Ga. Laws, at 2979-2985.

Georgia legislature proposed, and the Wilkes County voters adopted, a local constitutional amendment providing for the at-large election of all five members of the Board of Education. 1972 Ga. Laws, at 1518-1521. The amendment required that two members of the Board reside in District 1, the most populous district, and that one member reside in each of the other three districts. The amendment also provided that the Board should elect a chairman from among its members (J.S. 8 n.2; J.S. App. 3a).

3. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973c, prohibits a state or political subdivision covered by the first sentence of Section 4(b) of the Act, 42 U.S.C. (Supp. V) 1973b(b),[5] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless the change has been precleared by the United States District Court for the District of Columbia or the Attorney General. A covered state or political subdivision wishing to implement a change in its voting practices or procedures may file suit in the United States District Court for the District of Columbia seeking a declaratory judgment that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." Alternatively, the state or political subdivision may submit the proposed change to the Attorney General

[5]On August 6, 1965, the Attorney General and the Director of the Census having made the necessary findings under Section 4(b), Georgia was designated as a covered jurisdiction under the Act. 30 Fed. Reg. 9897 (1965). See also *Georgia* v. *United States*, 411 U.S. 526, 528 n.1 (1973).

and may then proceed to enforce the change if the Attorney General does not object within 60 days after the submission.[6]

4. On April 8, 1976, the Wilkes County Board of Commissioners and Board of Education submitted the 1972 changes in their method of election to the Assistant Attorney General for the Civil Rights Division of the Department of Justice. The Boards sought preclearance under Section 5 of the Voting Rights Act for the shift to at-large election of all five members of each Board. On June 4, 1976, the Assistant Attorney General, on behalf of the Attorney General, interposed an objection to the use of at-large elections to choose commissioners and Board of Education members previously elected from single-member districts in Wilkes County. The Assistant Attorney General took this step because he was unable to conclude that the 1972 changes in the method of selecting members of the Boards would not have the effect of discriminating on account of race or color.

Shortly after their failure to obtain the desired preclearance from the Attorney General, Wilkes County and the Wilkes County School District filed suit in the United States District Court for the District of Columbia. They sought a declaratory judgment that the change from district to at-large voting in the election of four members of the Board of Commissioners and four members of the Board of Education did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color. On cross-motions for summary judgment, the three-judge district court, convened in accordance with Section 5 of the Voting

[6]The constitutionality of this procedure was upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). The standards governing the Attorney General's action on proposed voting changes are set forth in 28 C.F.R. 51.19.

Rights Act, granted summary judgment for the United States and dismissed the Wilkes County complaints with prejudice (J.S. App. 18a-19a).

The court found substantial population variation among the four districts that comprise Wilkes County (J.S. App. 4a, 7a).[7] During the years between 1958 and 1972, each of these districts elected one county commissioner, and one member of the Board of Education. Because of the districts' highly unequal population, public officials in Wilkes County were not elected in conformity

[7]The district court's findings concerning the total population, voting age population, and number of registered voters in Wilkes County, as distributed by district and by race, are reflected in the following tables (J.S. App. 4a):

Total Population

Election District	Number Total	White	Black	Percentage White	Percentage Black
1	4,818	2,342	2,476	48.6	51.4
2	1,610	1,078	532	67.0	33.0
3	1,691	916	775	54.2	45.8
4	2,065	1,002	1,063	48.5	51.5
Total	10,184	5,338	4,846	53:0	47.0

Voting Age Population

Election District	Number Total	White	Black	Percentage White	Percentage Black
1	3,132	1,683	1,449	53.8	46.2
2	1,085	774	311	71.3	28.7
3	1,112	658	454	59.2	40.8
4	1,342	720	622	53.7	46.3
Total	6,671	3,835	2,836	57.5	32.5 [*sic*; 42.5]

Registered Voters (August 1977)

Election District	Number Total	White	Black	Percentage White	Percentage Black
1	2,418	1,582	836	65.4	34.6
2	731	687	44	94.0	6.0
3	870	611	259	70.2	29.8
4	845	532	313	63.0	37.0
Total	4,864	3,421	1,452	70.1	29.9

with the "one person, one vote" principle. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), held that that principle applies to the popular election of local governmental officials. Appellants have indicated (J.S. 8, 9) that the shift to at-large elections in 1972 was designed, in the aftermath of *Hadley*, to remedy the malapportionment of the existing single-member districts. The district court found that adoption of the at-large election system as a substitute for more fairly apportioned single-member districts occurred "shortly after black residents of Wilkes County began to register to vote in substantial numbers" (J.S. App. 10a). The court also found that adoption of the at-large election system occurred "without the consultation of representatives of the black community" and without consideration of "available options for satisfying one person, one vote requirements that would enhance black voting strength" (*ibid.*). Since the change to at-large elections, black registration has not increased significantly (*ibid.*).

The district court stated that in Wilkes County candidates for public office nominated by the Democratic Party "are invariably elected" (J.S. App. 7a),[8] and that "at least since 1964, none of the officers of the Democractic Party * * * have been black persons" (*ibid.*). Within recent decades, no black person has been elected to public office in Wilkes County, despite the fact that blacks constitute 47% of the county's population (*ibid.*). After examining the results of a number of Wilkes County primary elections in which white and black candidates

[8]Under Georgia Law, Ga. Code Ann. § 34-1513 (1978 Supp.), a majority vote in a primary election is a prerequisite for nomination for public office, including seats on county boards of commissioners and boards of education. See J.S. App. 2a, 3a.

opposed each other, the district court found that "racial bloc voting exists in the county and that black candidates receive little, if any, support from white voters" (*ibid.*).

On the basis of this evidence, the district court was unable to conclude that the 1972 voting changes in Wilkes County did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color (J.S. App. 12a, 13a). The court acknowledged that "black voters were not in a position to control any of the malapportioned districts," but nevertheless determined that under the malapportioned single-member district scheme, black residents "could exert substantially greater influence" in Districts 1 and 4 than they could under the at-large system (J.S. App. 12a).[9] In this sense the court found that the 1972 shift to at-large elections diminished black voting strength.[10] In addition, the court found that adoption of the at-large election plan slowed black voter registration and thus helped maintain the low percentage of registered voters among the black voting age population.[11] In light of

[9]In August 1977, 34.6% of the registered voters in District 1 and 37.0% of the registered voters in District 4 were black. By contrast, only 29.9% of the registered voters in the entire county were black.

[10]The court also observed that "if the county had been divided into fairly drawn single-member districts of equal population, the black population percentage in one district could have been as high as 71 percent" (J.S. App. 10a). The court therefore concluded that if Wilkes County's malapportioned districts had been replaced with properly apportioned single-member districts rather than the at-large election scheme, "the opportunity for black residents to participate in the political process would have been greatly enhanced" (J.S. App. 13a).

[11]The district court's statistics (J.S. App. 4a) indicate that only about half of the black voting age population in Wilkes County is registered to vote, while nearly 90% of the white voting age population is registered.

appellants' failure to present any evidence explaining the decision to elect the Board of Commissioners and Board of Education at-large rather than from fairly apportioned single-member districts, the district court held that appellants did not "meet their burden of demonstrating that the voting changes at issue are nondiscriminatory in purpose and effect" (J.S. App. 17a). Accordingly, the court refused to grant the declaratory relief sought by appellants.

ARGUMENT

In a declaratory judgment action under Section 5 of the Voting Rights Act, plaintiffs bear the burden of proving that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328, 335 (1966). The three-judge district court in the present case correctly held that appellants failed to carry that burden. Applying the standards announced in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), the district court ruled that the 1972 shift to at-large elections in Wilkes County had the effect of "diluting and reducing the voting strength exercised by blacks under the previously existing single-member districts, the district court held that failure to advance any explanation for their choice of an at-large election system rather than one of the other available methods of satisfying the "one person, one vote" requirement, the court found itself unable to conclude that the 1972 voting changes were adopted without a racially discriminatory purpose. The district court's refusal to grant the declaratory relief sought by appellants thus follows directly from a proper application of settled legal principles to the particular facts of this case. The judgment below should be affirmed.

1. Appellants did not prove that the adoption of an at-large election scheme in Wilkes County will not have the effect of denying of abridging the right to vote on account of race or color. Appellants do not challenge the district court's finding that racial bloc voting exists in Wilkes County. They apparently concede that under the at-large system black voters in the county have little or no chance of electing a candidate of their choice to either the Board of Commissioners or the Board of Education. They contend (J.S. 13-14), however, as they did in the district court (see J.S. App. 12a), that black voters' predicament under the at-large system is no worse than it was under the malapportioned single-member district scheme in effect between 1958 and 1972. Stressing that blacks do not constitute a majority of the registered voters in any of Wilkes County's four districts, appellants argue that black voters did not control and could not have expected to control any of the single-member districts. It follows, according to appellants, that the switch to at-large elections will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." See *Beer* v. *United States, supra,* 425 U.S. at 141; see also *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 159, 162-163 (1977) (plurality opinion). Because, under this Court's holding in *Beer,* Section 5 of the Voting Rights Act protects only against such retrogressions, appellants maintain that the district court should have granted the declaratory judgment they requested.

Appellants err in their assertion that the shift to at-large elections did not diminish the voting strength of blacks in Wilkes County. To be sure, given the district court's findings on the racial voting patterns that prevail in the county, the prospect of black voters electing a candidate of their choice to either the Board of Commissioners or the Board of Education was dim in the system of

malapportioned single-member districts that existed before the 1972 changes. But that prospect has been lessened (even without regard to the necessity of reapportionment) by appellant's decision to elect all members of both boards on an at-large basis. The August 1977 statistics in the district court's findings of fact (J.S. App. 4a; notes 7, 9, *supra*) reveal that 29.9% of the county's registered voters are black. In District 4 alone, however, blacks represent 37.0% of the registered voters, and in District 1, the most populous district, the comparable figure is 34.6%. Similar discrepancies also appear in the statistics concerning voting age population. While only 42.5% of Wilkes County's voting age population is black, blacks represent more than 46% of the voting age population in District 1 and in District 4. Moreover, blacks constitute a majority of the total population in both of those districts. Thus, the available information indicates that in District 1 and District 4 elections, black voters did exercise and would have continued to exercise an influence greater than they can exert in countywide elections.

At the time of the 1970 census, the black population of Wilkes County was considerably younger than the white population. The statistics reported in the census table cited by the district court (J.S. App. 4a n.3) suggest that by 1980 blacks probably will form a majority of the voting age population in District 1 and District 4.[12] If this population trend is accompanied by increased black voter registration, black voters in District 1 and District 4 might well be able to elect a candidate of their choice in single-

[12]At the same time, the likely increase in the black percentage of *countywide* voting age population will almost certainly be insufficient to offset completely the white majority position reflected in the 1970 census figures.

member district elections. The 1972 shift to at-large voting eliminates this potential and thus produces precisely the kind of retrogressive effect on a racial minority that *Beer* held impermissible.

Moreover, as the district court noted, in the absence of a change to a system of at-large elections, necessary reapportionment of the existing single-member districts is likely to enhance black voting strength in one or more of those districts. Since the need for periodic reapportionment is inherent in the use of single-member districting, it would be unrealistic to assess the effect of a change to an at-large system of elections without regard to the reapportionment of the single-member districts that otherwise must occur.

For all of these reasons, appellants' attempt (J.S. 13) to derive support from *Beer* is unavailing. The reapportionment plan sustained by this Court in *Beer* enhanced black voting strength. 425 U.S. at 141-142. In no sense can it be said that the 1972 change to at-large elections in Wilkes County had a similar effect. Indeed, as this Court has frequently observed, multimember districts "tend to submerge electoral minorities and over-represent electoral majorities." *Connor* v. *Finch*, 431 U.S. 407, 415 (1977); see also *Wise* v. *Lipscomb*, No. 77-529 (June 22, 1978) (White, J.), slip op. 4; *Chapman* v. *Meier*, 420 U.S. 1, 15-16 (1975). Appellants' reliance on *City of Richmond* v. *United States*, 422 U.S. 358 (1975), and *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973), is likewise misplaced. In those cases this Court approved cities' annexations of areas with predominantly white populations only because those annexations were accompanied by a shift from at-large voting to a single-member district system of electing local city councils. The Court explicitly acknowledged

(422 U.S. at 370) that "annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, [would have] created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council." *Richmond* and *Petersburg* therefore do not assist appellants' contention that the change to at-large elections in Wilkes County left black voting strength unaffected.

Citing *Washington* v. *Davis*, 426 U.S. 229 (1976), appellants suggest (J.S. 12-13) that, "in order to preserve the constitutionality of the language of Section 5," the statute's reference to discriminatory effect "must be construed as * * * embracing the presence of a 'purpose to discriminate.' " This assertion is completely without merit. *Washington* held that proof of an intent to discriminate is necessary to establish a violation of the Equal Protection Clause (426 U.S. at 242, 245). The Court's decision in that case did not even hint that Congress would be acting outside the limits of the Constitution if by statute it prohibited changes in voting standards, practices, and procedures whenever those changes have a discriminatory effect. In the present case, as in *Beer* (425 U.S. at 139; footnote omitted), "the question is not one of constitutional law, but of statutory construction." The language of Section 5 plainly indicates that an adverse racial effect alone is a sufficient basis for disapproving a voting change under Section 5, regardless of the purpose underlying that change. This Court has recognized as much. See *City of Richmond* v. *United States, supra*, 422 U.S. at 372. See also *City of Petersburg* v. *United States, supra*, 354 F. Supp. at 1027. And in any event, the record amply supports the district court's ruling that appellants failed to sustain their burden of proving that the 1972 changes were enacted without a discriminatory purpose.

2. In *Washington* v. *Davis, supra,* and in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court offered guidance concerning the methods by which discriminatory intent may be proved. The Court stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington* v. *Davis, supra,* 426 U.S. at 242. Additional pertinent factors may be the "historical background" of the disputed legislative or administrative action, the "specific sequence of events leading up to the challenged decision," and the "legislative or administrative history" of the action in question. *Village of Arlington Heights, supra,* 429 U.S. at 267-268. Of course, *Washington* and *Arlington Heights* both involved alleged violations of the Equal Protection Clause. Plaintiffs raising such a claim bear the burden of showing the existence of discriminatory intent. In declaratory judgment actions under Section 5 of the Voting Rights Act, by contrast, plaintiffs bear the burden of showing the *lack* of such intent.

The district court in the present case properly focused on the criteria listed in *Washington* and *Arlington Heights* in determining whether appellants carried their evidentiary burden. The court found that the shift to at-large elections occurred "shortly after black residents of Wilkes County began to register to vote in substantial numbers" (J.S. App. 10a). The court also found that the 1972 changes "were made without the consultation of representatives of the black community" (*ibid.*). Appellants assert (J.S. 8, 9) that the at-large election system was adopted in order to comply with the "one person, one vote" principle, but the district court observed that a properly apportioned single-member district system

also would have satisfied the "one person, one vote" requirement and could have achieved that goal without diminishing black voting strength. Indeed, the court found that appellants could have devised a fairly drawn district plan in which the black population percentage in one district would have been as high as 71% (J.S. App. 10a). Appellants offered absolutely no explanation for their decision to favor at-large elections over all other possible schemes by which "one person, one vote" problems could have been eliminated.[13] Under these circumstances the district court correctly concluded that appellants failed to prove that the 1972 voting changes were adopted without a racially discriminatory purpose.

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[13]For the first time in this Court, appellants suggest (J.S. 11 n.3) that it would have been impractical to create single-member districts of equal population in Wilkes County because "Georgia counties are divided geographically and for voting purposes on a militia district basis" and maintenance of a fairly apportioned single-member district system "would require decennial revision of election district lines along an entirely different basis than militia districts, which now are organized without regard to population." The short answer to appellants' eleventh hour explanation is that it was never presented to the district court. Appellants did not argue below that the shift to at-large voting was intended to preserve the militia district organizational structure and simultaneously to satisfy the "one person, one vote" standard. They may not raise that contention now in an effort to remedy their earlier failure to adduce sufficient evidence of their lack of discriminatory intent.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1978

DOJ-1978-11